

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

United States Court of Appeals
for the District of Columbia Circuit

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FILED NOV 30 1971

109

Nathan J. Paulson
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UNITED STATES OF AMERICA)

v.)

No. 24,338

ROBERT GRAY)

Appellant)

BRIEF FOR APPELLANT

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA)

v.)

No. 24,338

ROBERT GRAY)

Appellant)

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Whether defendant was deprived of the effective assistance of counsel because counsel failed to request a mental examination, even though defendant had moved for an examination pro se, said motion having been denied without prejudice.

REFERENCES TO PARTIES AND RULINGS

On April 10, 1970, Judge Aubrey E. Robinson, Jr. denied petitioner's motion for relief from judgment. (R 38a)

This case was previously before this Court as Gray v. United States, U. S. App. D. C. No. 16,972, decided May 2, 1963, 115 U. S. App. D. C. 324, 319 F.2d 725.

STATEMENT OF THE CASE

This is an appeal of a denial of a pro se motion seeking post-appellate relief pursuant to 28 USC Section 2241 and Section 2242. Appellant had been sentenced to a term of 15 years to life by Judge Alexander Holtzoff, U. S. District Court for the District of Columbia (R. 24), following a jury trial and conviction of murder in the second degree. (R. 20)

The motion was filed April 14, 1970, and contended, inter alia, that appellant was denied the effective assistance of counsel under and in the meaning of the Sixth Amendment because his counsel had failed to refile or otherwise press appellant's request for a mental examination. (R. 38) Prior to his trial appellant had filed, pro se, a motion for a mental examination on November 6, 1961. (R. 8) The motion was denied without prejudice (R. 8) and was not renewed at trial by his counsel.

On direct appeal from the conviction appellant's counsel argued that the question of his sanity at the time of his offense should have been submitted to the jury with appropriate instruction. This argument and others were rejected by the court which affirmed the judgment. 115 U. S. App. D. C. 324, 319 F.2d 725. In the direct appeal and in his prior actions appellant has never raised the question of effective assistance of counsel by reason of the failure of counsel to refile or otherwise argue for a mental examination

of defendant to determine his competency at the time of the alleged offense.

The motion for relief being appealed was denied by Judge Aubrey E. Robinson, Jr. on April 10, 1970. (R. 38) Judge Robinson stated in his order:

"In a pro se motion, petitioner seeks post-appellate relief from that judgment (1) in a Habeas Corpus petition pursuant to 28 U. S. C. #2241 and 2242, and (2) on the grounds of mental incompetency undisclosed at trial pursuant to 18 U. S. C. 4245. He also requests that he be allowed to proceed in forma pauperis. As grounds for the relief, the petitioner avows that at the time of the offense, he was suffering from temporary insanity, and as a result lacked the mental capacity required for the offense, and that the assistance of his counsel during the trial was ineffective.

"It appearing that these and other alleged irregularities in petitioner's trial were aired before the United States Court of Appeals for the District of Columbia and that that Court unanimously affirmed petitioner's conviction (Gray v. United States), No. 16,972, May 2, 1963) specifically finding that the issue of mental abnormality was 'insubstantial and illusory' (slip op. at 5), it is this 10th day of April 1970,

"ORDERED, that petitioner's motion be and hereby is denied." (R. 38)

Appellant's position on this appeal is that the question of effective assistance of counsel was not previously raised nor decided by this court in No. 16,972, and necessarily required granting the motion or a hearing before it could be denied.

The Homicide For Which Appellant Was Tried^{1/}

On August 1, 1961, at approximately 6:30 - 7:00 p.m.,^{2/} appellant arrived at the apartment of Adell Banks, located at 1029 - 16th Street, N. E., for a social visit (JA 27). Sometime later, Judas Perry, Adell Banks' brother, and Andrew Speaks, the deceased, arrived. For the next four hours or so, these four sat in Banks' living room watching television and drinking occasionally.

Towards the end of the evening, appellant asked Banks for her telephone number because it had recently been changed and borrowed a pencil from Speaks so that he could write it down on a scrap of paper. (JA 29). After returning from the bedroom where the telephone was located, appellant had absent mindedly placed the pencil in his shirt pocket as if it was his own. (Ibid.)

As he was handing the pencil to Speaks appellant either accidentally or deliberately (depending on whose testimony is believed) let the pencil fall to the floor and then sat down. (Ibid.) Speaks picked it up from the floor, sat

^{1/} This section is taken verbatim from the Brief for Appellant in No. 16,972. The references are to the Transcript and Joint Appendix filed therein.

^{2/} With the exception of the events following appellant's arrest, the precise times at which the various incidents described occurred are not decisive to the issues of this appeal.

down, but immediately jumped up kicking appellant in the face.

Appellant jumped quickly from the chair in which he was sitting and dashed out of the apartment. Either because Speaks had cut him with a linoleum knife he carried in his back trouser pocket or because appellant had shattered the glass pane in a door as he was fleeing the apartment, appellant suffered a cut on his hand.^{3/}

Appellant took a bus to his girl friend's apartment after wandering about for sometime, got the 22 caliber pistol he kept there, and returned to the neighborhood of Adell Banks' apartment. (JA 31-33).^{4/}

In the meantime, Adell Banks' brother and Speaks had left her apartment and crossed the street to talk with Minnie Phillips and Irene Williams who were sitting on their

^{3/} Phillistine Onley was apparently walking by as appellant fled on her way to get her children from a babysitter. According to her testimony, "As I was walking past 1029 I heard glass breaking in this apartment, and I started to keep on walking, but I stopped there for just a second, and I heard somebody in the apartment say, 'He must be crazy,' and then this man ran out of the house, and as he ran out of the house he said these words; he said, 'Don't nobody treat me like that,' and 'I'll kill him,' and he ran around the side." (JA 4).

^{4/} Appellant testified that he came back so that he could talk with Adell Banks and find out from her what had happened and why it had happened. (JA 32). He explained his retrieval of the pistol at this particular time by reference to an earlier decision to take it to his mother's home where it would be out of reach of children. (JA 31-32).

porch. These four shortly recrossed the street preparatory to going for some beer and were in front of Banks' apartment when appellant reached a point on the opposite side of the street from them. (JA 22-24).

Claiming that Speaks saw him and started menacingly toward him, appellant unwrapped his pistol from a paper bag and shot Speaks. (Ibid.) Of the five people on the scene, i.e., Judas Perry, the two women and two young nieces of Adell Banks, only Minnie Phillips actually saw appellant shoot Speaks.^{5/} (Tr. 67, 84-85, 95, 118, 144). She so testified at the trial even though she had testified directly to the contrary at the coroner's inquest -- a fact not brought out during the trial. (Tr. 118).

After the shooting, which took place at 1:55 a.m., appellant ran from the scene, threw his pistol in a bush and finally made his way back to his girl friend's apartment at approximately 3:30 a.m. (JA 35).

The police were already there and appellant surrendered himself. (JA 9-10, 35). He admitted shooting Speaks to Detective Wallace, who had arrested him. (Ibid.) Instead of booking him, however, the police thereupon took appellant

^{5/} Each of these witnesses also testified that he did not see Speaks advance on appellant, which is hardly surprising inasmuch as only one of them saw how and who shot Speaks, and even this witness testified previously at the coroner's inquest that she did not see what happened.

back to the scene of the homicide^{6/} and used him in their search for the pistol. (Ibid.)

Finally, at 5:00 a.m., the police took appellant to the Homicide Squad Office where, at 5:30 a.m., he signed a statement in which he admitted that he had shot Speaks. (JA 13-15).^{7/}

Motion for Mental Examination

On November 7, 1961, appellant filed a motion pro se requesting the District Court "to order a mental observation at St. Elizabeth's Hospital to determine [his] mental competency at the time of the alleged crime." (R. 8). There was no response to the motion by the government and appellant's counsel did not appear in support of the motion or take any action in connection therewith. The District Court did not

^{6/} One of Speaks' possessions removed from his body by the police was a linoleum knife. Interestingly enough, this find was never disclosed to appellant at any time during his interrogation, even when questioned about the cut on his hand. Chemical tests as to the presence of blood on the knife were ultimately negative but the police did not know this when they were questioning appellant.

^{7/} Although defense counsel did not formally object to Officer Banta's testimony at the trial recounting what appellant had said to him before and shortly after the arrest, counsel did register an objection to the question-answer form of the signed statement. (JA 16). This objection was overruled by the trial court and the statement was admitted into evidence. (JA 17). It contained the usual boilerplate phrase that it was "made freely and voluntarily." (JA 18, 20).

hold a hearing before denying the motion. On November 13, 1961, six days after it had been filed, Chief Judge McGuire entered an order denying the motion without prejudice. (R. 8). The question of appellant's mental condition at the time of the alleged offense was not expressly raised again during the course of the trial, except that some testimony during the trial had a bearing on appellant's mental condition.

In a pro se motion filed after the trial, appellant wrote as follows:

"Your petitioner contends that the testimony during trial was overwhelming to the effect that petitioner, at the commission of the offense charged, was suffering from a mental disturbance and there was a causal connection between petitioner mental condition and commission of the offense charged."

SUMMARY OF ARGUMENT

A defendant is entitled to raise any and all defenses which are applicable to the charge. He has a right to require the government to prove every material allegation of the offense charged.

Insanity at the time of the alleged offense is an absolute defense to the charge of murder.

The defendant raised the question of sanity, pro se, and expressly sought a determination of his mental state.

The defendant was denied his constitutional right to the effective assistance of counsel when counsel failed to press his request for a mental examination. This failure precluded counsel from effectively arguing the defense of insanity, and therefore precluded counsel from adequately representing the defendant in the circumstances of this case.

A habeas corpus motion alleging denial of constitutional rights, not previously raised, must be granted or defendant granted a hearing.

ARGUMENT

I. Defendant is Entitled to Present Any Defenses Applicable to the Charge.

A defendant in a criminal proceeding is entitled to raise any and all defenses which are applicable to the charge against him. While counsel representing a defendant is under no obligation to present arguments or defenses which are obviously specious or frivolous, counsel is obligated to present every reasonable and appropriate legal defense which defendant wishes to bring before the court and jury.

An accused has a right to elect to stand trial or plead guilty. If he elects to stand trial, his right to counsel under the Sixth Amendment means counsel who will vigorously present every legal or factual defense to the charge. Anything short of this is not adequate, competent or effective representation by counsel which the Constitution requires. Abraham v. State, 228 Ind. 179, 91 N.E. 2d 358, 360. The decision by trial counsel not to refile petitioner's motion for a mental examination, or not to request same, precluded counsel from being able to effectively argue perhaps the strongest defense which petitioner had at trial. In Johnson v. U. S., ____ App. D. C. ____, 110 F.2d 562, this court held that the failure of trial counsel to produce all available evidence did not deprive accused of his right to a new trial

at which he could produce the omitted evidence. The failure of counsel to produce all available evidence, in a case involving the life of an accused, should not be held against him." (p. 563).

In Johnson, trial counsel's failure to produce the sole favorable eyewitness to the shooting substantially reduced the argument of self defense being urged on behalf of the defendant. In the instant case trial counsel's decision not to request an examination for a determination of mental competence, effectively prevented counsel from arguing the defense of insanity at the time of the charge. Appellant should not be deprived of a mental examination, in view of his motion, pro se, prior to trial, his testimony immediately subsequent to the shooting (his confession) and his inability at trial to recall certain of the incidents relevant to the night of the shooting, all of which reinforce the need for the examination.

A defendant is entitled to be advised as to all his legal rights under the law and the facts, and under the U. S. Constitution he has the right to require the state to prove every material allegation of the offense charged. The critical element of the offense charged was that appellant "purposely and with deliberate and premeditated malice" shot the decedent. If the appellant was not capable of forming

the required intent due to his mental incompetence at the time of the act, he could not have been found guilty. If the appellant's mental competence had been studied by examination prior to trial, appellant might have been found to be insane at the time of the act. Had he received a mental examination, the government might have been unable to prove the critical intent element of the charge of murder or evidence supporting that proposition might have been adduced. In either event appellant would have had evidence to present to the jury on the defense of insanity. To adequately present the defense, appellant needed the assistance of an examination into his mental state. Of course, it is no answer to say, as did Judge Holtzoff, that the appellant at trial seemed competent. He was not contending incompetence at that time but rather at the time of the offense.

II. Insanity at the Time of the Offense is a Complete Defense to the Charge.

Insanity at the time of the alleged offense is an absolute defense. "An insane person is not capable of committing crime. Thus, a person cannot be legally punished for an act which committed while insane, although this same act would constitute a crime if done by a sane person. The defense of insanity is available to all defendants in all criminal trials. And it is a complete defense not a mitigating circumstance." 21 Am. Jur. 2d p. 116. Bishop v. U. S., 96 U. S. App. D. C. 117, 223 F.2d 582; Watson v. U. S.,

An insane person cannot legally be guilty of any criminal intent. If he is incapable of criminal intent, then he is not in law responsible, since one of the essential ingredients of the crime is necessarily missing.

III. Appellant Made a Timely Request to Raise
the Question of his Mental Competency.

Appellant clearly wanted a determination of his mental state as he raised the question of sanity by filing a motion, pro se, requesting the District Court "to order a mental observation at St. Elizabeth's Hospital to determine mental competency at the time of the alleged crime." (R. 8).

There was no response to the motion by the government and appellant's counsel did not appear in support of the motion nor take any action in connection therewith. The District Court did not hold a hearing before denying the motion.

The question of appellant's mental condition at the time of the alleged offense was not expressly raised again during the course of the trial, except that some testimony was adduced at the trial bearing on petitioner's mental condition. Appellant's testimony at trial frequently indicated both a failure to remember as well as understand many of the occurrences of the night of the alleged murder. This testimony tends to reinforce appellant's pro se motion, in pointing up

the need for a mental examination to determine his competency.

The pertinent testimony is set forth in Appendix A to the Brief of Appellant in No. 16,972

IV. Failure to Provide a Mental Examination
Precluded Raising the Insanity Defense
and Deprived Appellant of Effective
Assistance of Counsel.

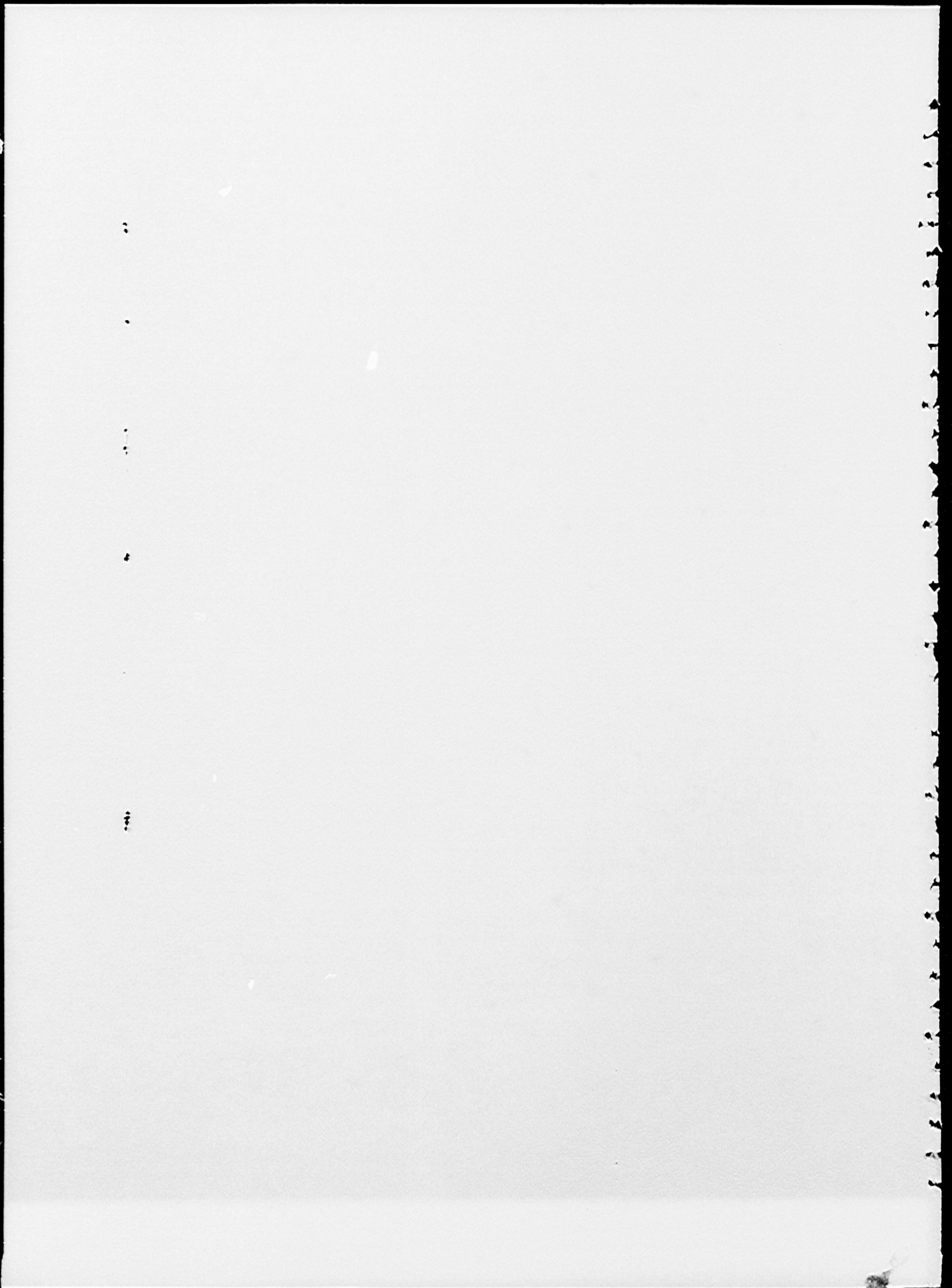
Because the appellant's major defense was probably that of insanity, the appellant was denied his constitutional right to the effective assistance of counsel when counsel failed to press the request for a mental examination. The absence of a mental examination precluded counsel from effectively arguing the defense of insanity, and therefore precluded counsel from adequately representing the defendant in the circumstances of this case. In Heard v. U. S., ____ U. S. App. D. C. ____, 390 F.2d 866, this court held that a 28 USC §2255 motion required a hearing on the question of whether court appointed counsel provided effective assistance where the major defense was insanity, but that defense was presented in such a way that the trial court deemed it unnecessary to give an insanity instruction. In Heard, as here, it was contended that a mental competency hearing was needed. Without deciding whether there was ineffective assistance of counsel, the court remanded the case to the District Court, and stated:

"If the District Court finds that appellant received effective assistance of counsel, it must also decide whether he was entitled to a competency hearing at trial. If he was, the court must further determine whether a nunc pro tunc competency hearing is feasible at this late date or whether due process requires a new trial." (p. 353).

Counsel's assistance was not ineffective in the sense that he failed to provide a defense. Obviously his efforts convinced the jury to acquit on first degree murder, and convict on second degree. But it was ineffective in the constitutional sense since it deprived the defendant of the defense of incompetency at the time of the trial. Whether the defense would have succeeded is not significant. Appellant had the right to raise that defense and his counsel failed to take the first step in that direction by renewing the motion for a mental examination. Thus, appellant did not receive the assistance of counsel required by the Sixth Amendment.

V. The Habeas Corpus Motion Should Have Been Granted or a Hearing Held.

Petitioner's habeas corpus motion alleging a denial of his constitutional rights, i.e., ineffective assistance of counsel, a point not previously raised must be granted, or be granted a hearing. U. S. v. Simpson, 144 U. S. App. D. C. 8, 436 F.2d 162 (1970). In Smith v. U. S., 88 U. S. App. D. C. 80, 187 F.2d 192, 1950, the court held that habeas corpus is



available "to correct the denial of any constitutional right."

To deny habeas corpus in circumstances such as these without a hearing would seriously impair the constitutional guarantee of the right of counsel.

A judgment of conviction is subject to collateral attack where the petitioner shows that during the trial "his constitutional rights were so far denied that the court lost jurisdiction." Dorsey v. Gill, 80 U. S. App. D. C. 9, 148 F.2d 857. See, also, Evans v. Rives, 75 U. S. App. D. C. 242, 126 F.2d 633.

CONCLUSION

In view of the foregoing, the decision of the District Court should be reversed and the cause remanded with direction to either (1) order a mental examination, or (2) hold a hearing on the habeas corpus motion.

Respectfully submitted,

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November 29, 1971

BRIEF AND APPENDIX FOR APPELLEE

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,338

UNITED STATES OF AMERICA, APPELLEE

v.

ROBERT GRAY, APPELLANT

Appeal from the United States District Court
for the District of Columbia

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United States Attorney.

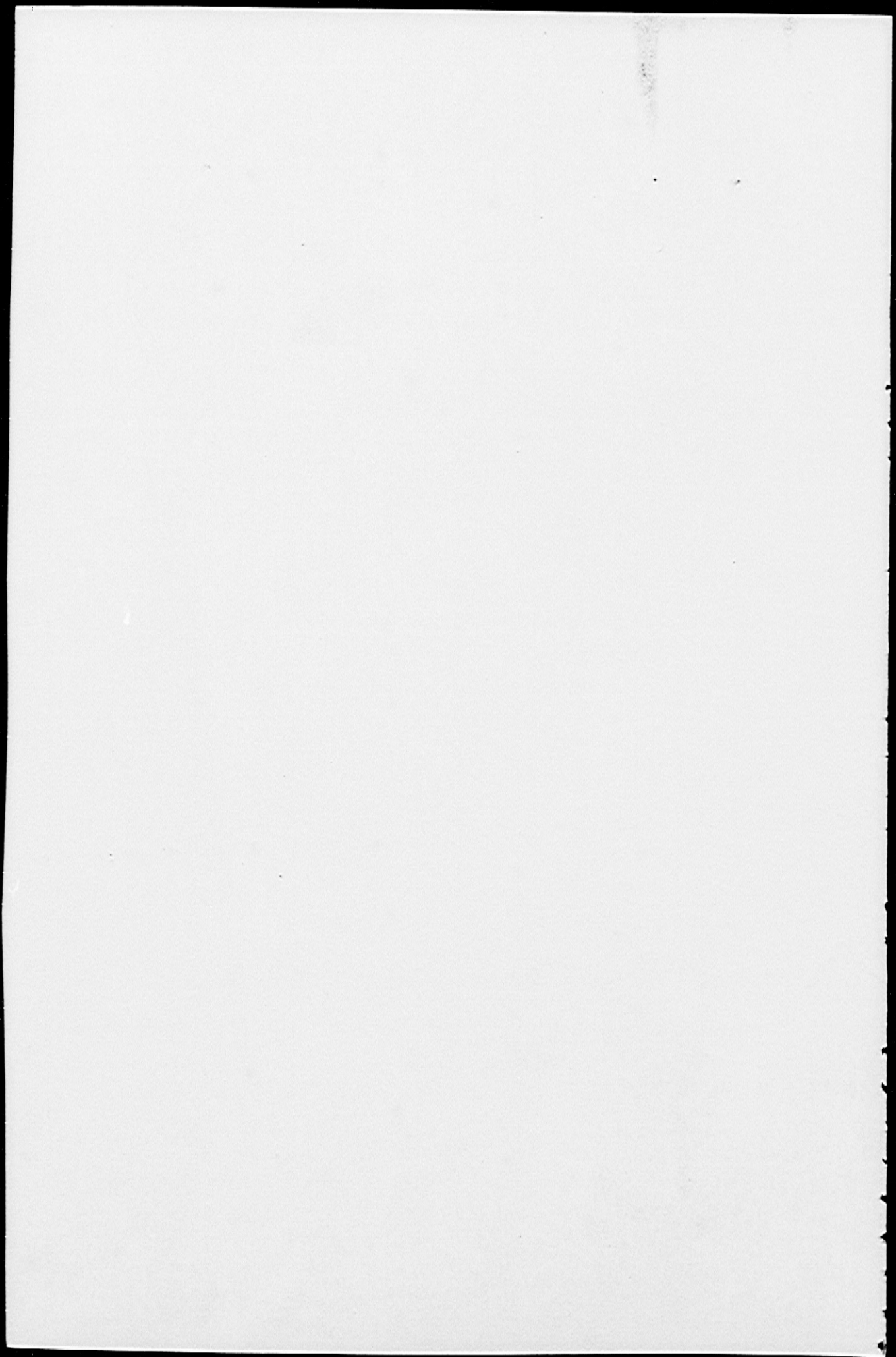
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Cr. No. 730-61

United States Court of Appeals
for the District of Columbia Circuit

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* Cases chiefly relied upon are marked by asterisks.

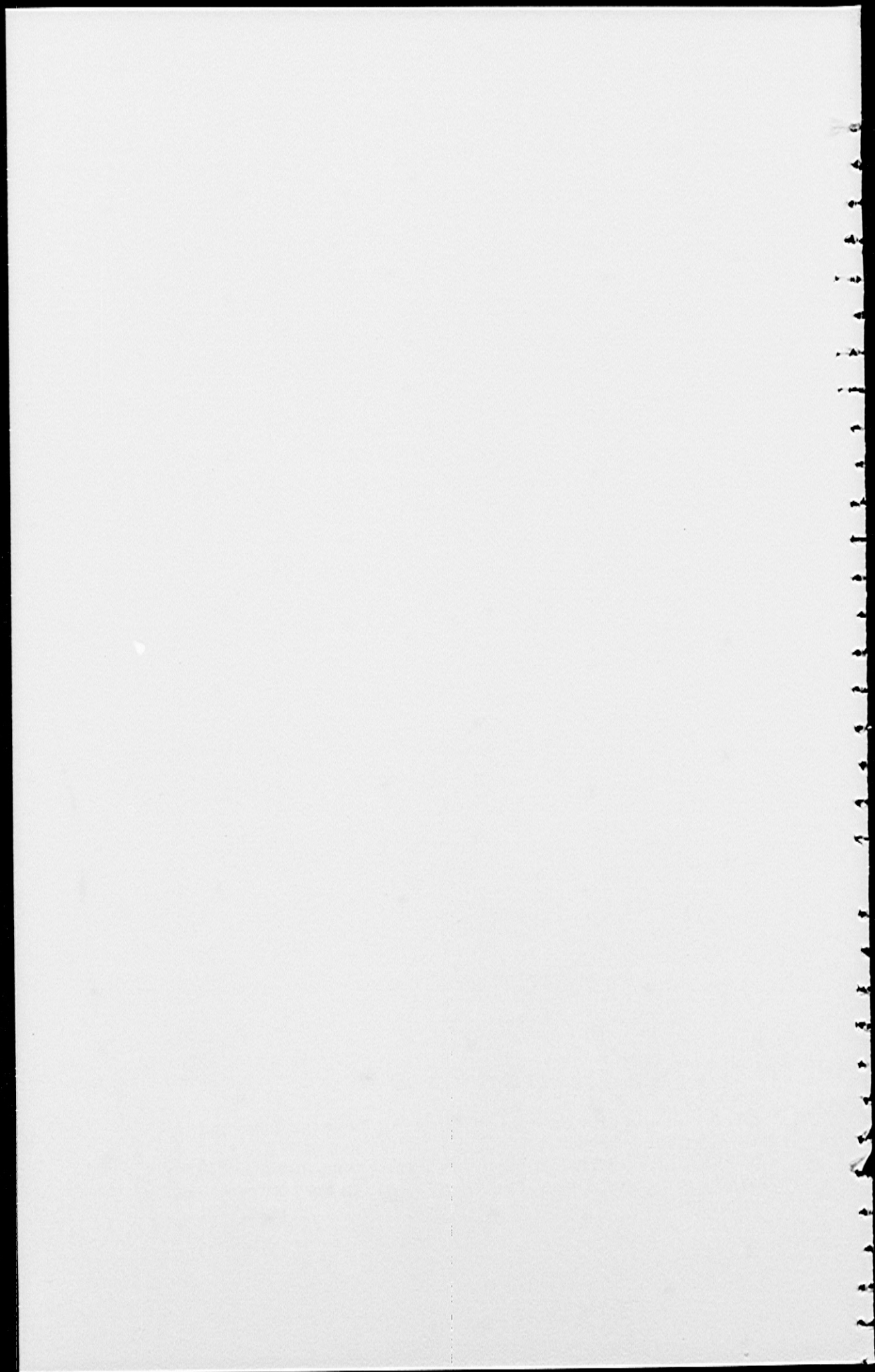
III

ISSUES PRESENTED *

In the opinion of appellee, the following issues are presented:

1. Whether the instant appeal should be dismissed since it presents the same issues raised by appellant and resolved against him by this Court in a 1963 appeal?
2. Whether appellant was accorded effective assistance at his 1962 trial by his retained counsel?
3. Whether the trial court was required to grant appellant a hearing on his motion for post-conviction relief when the files and records of the case conclusively showed that he was not entitled to any relief?

* This case has previously been before this Court on direct appeal from appellant's conviction. *Gray v. United States*, 115 U.S. App. D.C. 324, 319 F.2d 725 (1963). The instant appeal is taken from the District Court's denial of appellant's petition for post-conviction collateral relief.



United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,338

UNITED STATES OF AMERICA, APPELLEE

v.

ROBERT GRAY, APPELLANT

**Appeal from the United States District Court
for the District of Columbia**

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Procedural History

Appellant was charged in a one-count indictment filed September 5, 1961, with murder in the first degree in violation of 22 D.C. Code § 2401. After a jury trial¹ before the Honorable Alexander Holtzoff on January 18, 19, 22, 23, 24, 25, and February 7, 1962, appellant was found guilty of second-degree murder, a lesser included

¹ Appellant had originally entered a plea of guilty to second-degree murder on October 12, 1961, but was permitted to withdraw it and to reinstate his not guilty plea to the first-degree murder charge on November 15, 1961, by the Honorable Matthew F. McGuire.

offense, on February 8. Appellant was sentenced on March 23, 1962, to a term of imprisonment for fifteen years to life.

On April 3, 1962, appellant noted an appeal, without prepayment of costs,² which was docketed in this Court as No. 16,972. Appellant contended in his appeal (1) that his confession had been improperly admitted into evidence; (2) that he was deprived of his right to a speedy trial; and (3) that the trial court erred in not instructing the jury on the issue of insanity. As part of the last contention, appellant argued that he had been denied the effective assistance of counsel because his retained attorney "was not sympathetic to the defense [of insanity] and consequently made no effort to elicit testimony concerning appellant's mental state at the time of the homicide."³ These claims were rejected by a division of this Court in a *per curiam* opinion issued May 2, 1963. *Gray v. United States*, 115 U.S. App. D.C. 324, 319 F.2d 725 (1963). A petition for rehearing *en banc* was denied by the full court on June 11, 1963. These same issues—with the ineffective assistance argument figuring more prominently—were raised once again in a petition for certiorari to the Supreme Court, which was also denied. *Gray v. United States*, 375 U.S. 863 (1963).

On October 31, 1967, appellant filed a motion for reduction of sentence with the trial judge. That motion was denied on November 10, 1967, in a memorandum stating that the court was without jurisdiction to reduce the sentence under Rule 35, FED. R. CRIM. P., since the time within which it could do so had expired.⁴

² See Memorandum of Judge Holtzoff in the appendix to this brief, *infra*, pp. 13-14.

³ See appellant's brief in No. 16,972 at pp. 15-16, 22 (hereinafter referred to as the 1963 Brief). See also appellant's petition for rehearing *en banc* in No. 16,972 at pp. 2, 6.

⁴ In that memorandum the court added that although it was without jurisdiction to reduce the sentence, it had

[n]evertheless . . . reviewed its trial notes. On the merits, if the question were open, the Court would not reduce the

Finally, on January 22, 1970, appellant filed a habeas corpus petition under 28 U.S.C. §§ 2241 and 2242 requesting post-conviction relief. In that petition appellant alleged that as a result of the ineffective assistance of his trial counsel he was unable to present a proper insanity defense. The Honorable Aubrey E. Robinson, Jr., denied the petition without a hearing, on April 10, 1970. Judge Robinson's order declared:

In a *pro-se* motion, petitioner seeks appellate relief from [the 1962] . . . judgment (1) in a habeas corpus petition pursuant to 28 U.S.C. §§ 2241 and 2242, and (2) on the grounds of mental incompetency undisclosed at trial pursuant to 18 U.S.C. [§] 4245. He also requests that he be allowed to proceed in forma pauperis. As grounds for the relief the petitioner avows that at the time of the offense, he was suffering from temporary insanity, and as a result lacked the mental capacity required for the offense, and that the assistance of his counsel during the trial was ineffective.

It appearing that these and other irregularities in petitioner's trial were aired before the United States Court of Appeals for the District of Columbia Circuit and that that Court unanimously affirmed petitioner's conviction (*Gray v. United States*, No. 16,922, May 2, 1963) specifically finding that the issue of mental abnormality was "insubstantial and illusory" (slip op. at 5), it is this 10th day of April 1970.

ORDERED, that petitioner's motion be and hereby is denied.

Appellant sought to appeal from that ruling to this Court. On August 27, 1970, a motions division of this Court denied appellant's motion for appointment of counsel and dismissed his appeal. Subsequently, however, that order

sentence. The defendant fatally shot his victim in cold blood in revenge for a petty quarrel that occurred earlier on the day of the killing.

was vacated, and appellant's appeal was docketed as No. 24,338 (the instant case).

The Trial

On November 7, 1961, although appellant had already retained counsel, he filed a *pro se* motion seeking a mental examination in order to determine his competency at the time of the crime. The motion was denied without prejudice to its being raised again at trial. Notice of the denial was sent to appellant and his counsel (J.A. 2),⁵ but no further motions were filed at trial either by appellant *pro se* or by his attorney.

The testimony adduced at the trial showed that on the evening of August 1, 1961, at approximately 6:30 p.m., appellant visited the apartment of Adell Banks at 1029 16th Street, N.E. (Tr. 28). Andrew Speaks, the decedent, arrived some time later (Tr. 29). During the course of the evening, appellant borrowed a pencil from Speaks in order to write down Miss Banks' telephone number. When Speaks asked for his pencil back, appellant threw it on the floor, and Speaks kicked appellant (Tr. 30, J.A. 19). Appellant yelled out, "I'll kill him," and ran out of the apartment, breaking the glass door in the process (J.A. 19).

He then took a bus to his girl friend's apartment at 2912 13th Street, N.W., where he obtained his loaded gun, placed it in a bag and returned to Miss Banks' apartment (J.A. 10, 19, 20). As he approached the building, he saw Speaks standing in the street with two women and a man (Tr. 68, J.A. 19). Appellant, standing some seven or eight feet away from Speaks (Tr. 98), shouted at him, "Hey, hold it," called him a "nasty mother fucker," and shot him six times (Tr. 66, 83, 99, 197, J.A. 19).

⁵ The joint appendix filed in No. 16,972, which contains a copy of the indictment, the motion for mental observation, and pertinent excerpts from the trial transcript, is referred to herein as "J.A.," and the trial transcript as "Tr."

Appellant disposed of the murder weapon in a bush and fled to his girl friend's apartment (J.A. 19). Upon his arrival there, he was arrested by a police officer who was already waiting for him. Appellant readily acknowledged that he "had did it" and stated, "don't worry, I don't have the gun. I will show you where I hid it." (J.A. 9.) Appellant and the officer immediately returned to the scene and recovered the weapon (J.A. 10, 35). During the search for the gun, appellant supplemented his spontaneous admissions with a detailed account of the shooting (J.A. 10), which he later reduced to writing (J.A. 35). Appellant had been fully advised of his right to remain silent prior to both his oral and written confessions (J.A. 10, 18.)

Appellant, who claimed that he had acted in self-defense, gave a slightly different version of the events. He testified that when he returned Speaks' pencil, he accidentally dropped it, and that Speaks kicked him in the chin as he picked it up (J.A. 27-29). Speaks had also "cut" him (J.A. 31, Tr. 254). Appellant thereupon left the apartment (J.A. 29). He then suddenly found himself on a bus and proceeded to his girl friend's apartment, where he took his gun because he "was afraid that maybe they [the girl friend's children] would get the gun and be playing cowboys or something with it" (Tr. 255, J.A. 31). He placed the gun in a bag because he did not want to be arrested for carrying a concealed weapon (J.A. 33) and returned to the Banks home (J.A. 34, 48). When he arrived someone yelled at him. He looked up and saw two women, one man and Speaks. He saw Speaks put his hand in his pocket and walk towards him. Appellant "jerked the pistol out of the bag and started firing and running" (J.A. 34). He walked back to his girl friend's house, disposing of the weapon in a bush (Tr. 260). Upon arrival there he encountered the police officers, was placed under arrest, and led them to the murder weapon (J.A. 34-35).

ARGUMENT

- I. This appeal should be dismissed since it presents issues already raised in a previous appeal; and in any event, appellant was not denied the effective assistance of counsel at his 1962 trial.

(Tr. 260; J.A. 2, 31-35)

In the instant appeal appellant contends that he was deprived of effective assistance of counsel at his 1962 trial. This contention is grounded solely on the fact that appellant's trial counsel did not renew his pre-trial *pro se* motion for mental observation, which had been denied by the court without prejudice to its being raised again at trial. (See Appellant's brief at pp. 11, 13-14.) Appellant's contention is unsound for two reasons: (1) that this Court has already rejected his claim of ineffective assistance of counsel in his previous appeal, and (2) that he was represented by able attorneys who defended him vigorously and were able, against great odds, to obtain a conviction for an offense of a lesser nature than the one for which he stood trial.

A. The issues presented here were previously adjudicated by this Court.

In his 1963 appeal from his conviction, appellant amply raised the issue of ineffective assistance of counsel. In a brief submitted to this Court in No. 16,972, appellant argued that his "trial counsel was not sympathetic with the defense [of insanity] and consequently made no effort to elicit testimony concerning [his] . . . mental state at the time of the homicide." 1963 Brief at 15-16.⁶ He further accused trial counsel of having gone "too far in conceding [his] . . . sanity." 1963 Brief at 22. This issue was brought to the fore once again in appellant's petition for rehearing *en banc* following this Court's deci-

⁶ See also 1963 Brief at 16 n.21.

sion in No. 16,972. At page 2 of that petition appellant asked rhetorically: "Whether or not a criminal conviction can stand in the District of Columbia where the defendant has not enjoyed the right to effective assistance of counsel . . . in violation of the Sixth Amendment?" At page 6 of the same petition appellant declared that he "was denied effective assistance of counsel when counsel failed to raise the issue of insanity, with full knowledge of appellant's pretrial motion." This Court, however, rejected these contentions in its *per curiam* opinion and again in its denial of rehearing *en banc*.⁷ Judge Burger in a concurring opinion voiced disapproval of the notion that the trial court was required "to determine whether the trial counsel acted with appellant's consent in failing to press the issue of his mental condition"⁸ and concluded that "the evidence of mental abnormality was so insubstantial and illusory that it raised no issue." 115 U.S. App. D.C. at 326, 319 F.2d at 727. We submit that appellant, having already raised the issue of ineffective assistance of counsel in his direct appeal, is not entitled to raise it once again by collateral attack. *Sanders v. United States*, 373 U.S. 1, 16-17 (1963); *Townsend v. Sain*, 372 U.S. 293, 317-318 (1963); *Lampe v. United States*, 110 U.S. App. D.C. 69, 288 F.2d 881 (1961) (*en banc*), *cert. denied*, 368 U.S. 958 (1962).⁹

⁷ The petition for rehearing *en banc* was denied by order on June 11, 1963.

⁸ See also *Williams v. United States*, 120 U.S. App. D.C. 244, 247, 345 F.2d 733, 736 (Burger, J., concurring), *cert. denied*, 382 U.S. 962 (1965).

⁹ The case of *Heard v. United States*, 129 U.S. App. D.C. 100, 390 F.2d 866 (1968), cited by appellant, is clearly inapposite. In *Heard* the majority did not agree that the ineffective assistance of counsel issue had been previously adjudicated. The opinion pointed out: "There was no reference whatsoever to the issue in the original opinion of the panel majority, nor was it raised in the briefs or argument on appellant's direct appeal." *Id.* at 101, 390 F.2d at 867.

B. Appellant was not denied the effective assistance of counsel.

Appellants claim of ineffective assistance of counsel is in any event without merit. Suffice it to say that appellant can only succeed on such a claim only if he can show "both that there has been gross incompetence of counsel and that this has in effect blotted out the essence of a substantial defense." *Bruce v. United States*, 126 U.S. App. D.C. 336, 339-340, 379 F.2d 113, 116-117 (1967); accord, *Scott v. United States*, 138 U.S. App. D.C. 339, 427 F.2d 609 (1970); *Mitchell v. United States*, 104 U.S. App. D.C. 57, 259 F.2d 787, cert. denied, 358 U.S. 850 (1958). It must be remembered that "the burden on the appellant to establish his claim of ineffective assistance of counsel is heavy." *Harried v. United States*, 128 U.S. App. D.C. 330, 333, 389 F.2d 284, 287 (1967); see *United States v. Hammonds*, 138 U.S. App. D.C. 166, 169, 425 F.2d 597, 600 (1970). A "more powerful showing of inadequacy" is required in order to prevail on an ineffective assistance claim on collateral attack than on direct appeal. *Bruce v. United States*, supra, 126 U.S. App. D.C. at 340, 379 F.2d at 117. See also *Dyer v. United States*, 126 U.S. App. D.C. 3, 379 F.2d 89 (1967); *United States v. Poe*, 122 U.S. App. D.C. 163, 352 F.2d 639 (1965), affirming 233 F. Supp. 173 (D.D.C. 1964) (Wright, Circuit Judge, sitting by designation). Moreover, in resolving issues such as the one presented here, courts will look at the entire record, *Harried v. United States*, supra, 126 U.S. App. D.C. at 340 n.5, 379 F.2d at 113 n.5, and will not review by hindsight trial counsel's judgment on questions of trial tactics or strategy. *Cardarella v. United States*, 375 F.2d 222, 230 (8th Cir.), cert. denied, 389 U.S. 882 (1967); *Towler v. United States*, 271 A.2d 553, 555 (D.C. Ct. App. 1970).

In the instant case, as the District Judge pointed out after the trial, the evidence "would have amply justified a conviction of murder in the first degree, as [appellant] . . . had fatally shot the deceased in cold blood after an

interval of an hour or more following a petty quarrel arising out of a paltry episode." (Appendix, *infra*, p. 13.) Appellant in his brief recognizes, as he must, that it was entirely due to trial counsel's efforts and ability that the jury returned a guilty verdict as to murder in the second degree rather than in the first degree. In fact, a close scrutiny of the trial transcript indicates that counsel would have been hard put to develop an insanity defense in view of the fact that the murder occurred over one hour after the pencil incident.

Furthermore, appellant, in an attempt to prove that he was insane at the time of the offense, testified that he could not remember everything that had occurred during the one-hour interim period. Yet he repeatedly contradicted himself during his testimony by showing that he in fact did remember specific details of the crime—his acquisition of the gun and the reasons for it (J.A. 31); his plans to confront Adell Banks (J.A. 31-32); his route and method of transportation when returning to the scene of the crime (J.A. 33); his encounter with Speaks (J.A. 33-34); specific actions on the part of Speaks; the details of the shooting (J.A. 34); the discarding of the weapon (Tr. 260); the encounter with the police leading to his arrest, and the recovery of the gun with his assistance (J.A. 34-35). Indeed, the only thing which appellant stated he could not recall was how he got on the bus taking him to his girl friend's house after leaving Adell Banks' apartment (J.A. 30). Moreover, since trial counsel received a notice of the court's denial of appellant's motion for mental examination without prejudice to its being raised at trial (J.A. 2), it must be assumed that he considered the matter and decided that it was in his client's best interest not to renew it.¹⁰

¹⁰ Compare *Heard v. United States*, *supra* note 9, where the appellant's main defense was insanity, and "counsel presented that defense in such a way that the trial court deemed it unnecessary to give an insanity instruction." 129 U.S. App. D.C. at 102, 390 F.2d at 868.

In sum, we submit that both trial counsel provided this appellant with effective representation at his trial, and that, viewing this record as a whole, appellant has failed to meet his heavy burden of showing that there has been "gross incompetence of counsel and that this has in effect blotted out the essence of a substantial defense." *Bruce v. United States, supra.*

II. The trial court was not required to grant appellant a hearing on his habeas corpus petition.

Appellant finally contends that the District Judge committed reversible error when he failed to hold a hearing on his habeas corpus petition. We submit that under the circumstances of this case appellant was not entitled to such a hearing.¹¹

Title 28 U.S.C. § 2243 provides in part:

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, *unless it appears from the application that the applicant . . . is not entitled thereto.* [Emphasis added.]

Various courts interpreting that section have held that if a habeas corpus petition discloses on its face that petitioner is not entitled to the writ, the District Court would be warranted in denying relief without issuing a show cause order or holding an evidentiary hearing. *Hunt v. Ey-*

¹¹ Furthermore, it appears that the District Court may have been without jurisdiction to entertain a motion pursuant to 28 U.S.C. § 2241 since appellant is currently incarcerated at the Lorton Reformatory. *Schlanger v. Seamans*, 402 U.S. 990 (1971); *Ahrens v. Clark*, 335 U.S. 188 (1948). Additionally, appellant cannot resort to 28 U.S.C. § 2241 until he has exhausted his remedies under section 2255, and appellant never filed a § 2255 motion in the instant case. However, for the purposes of this appeal we shall treat his petition as though it were a § 2255 motion, since the remedy under section 2255 is, for all practical purposes, equivalent to habeas corpus. See, e.g., *United States v. Hayman*, 342 U.S. 205 (1952); *Smith v. United States*, 88 U.S. App. D.C. 80, 187 F.2d (1950), *cert. denied*, 341 U.S. 927 (1951).

man, 429 F.2d 1318 (9th Cir. 1970); *Boyd v. Oklahoma*, 375 F.2d 481, 482 (10th Cir. 1967). Similarly, a hearing is not required where the files and records before the court conclusively show that the petitioner is not entitled to relief, *Masters v. Eide*, 353 F.2d 517, 518-519 (8th Cir. 1965), or where the merits can be determined from an examination of these records. *Yeaman v. United States*, 326 F.2d 293, 294 (9th Cir. 1963). In *Dorsey v. Gill*, 80 U.S. App. D.C. 9, 148 F.2d 857, cert. denied, 325 U.S. 890 (1945), relied upon by appellant, this Court stated:

It is apparent, therefore, that the words of the statute . . . include information available to the judge by judicial notice, to which the allegations of the petition refer or upon which they depend; it is the duty of the judge to look through the petition, to the record, in order that he may discover such information; having done so, the exercise of sound judicial discretion may require that the petition be dismissed 80 U.S. App. D.C. at 22, 148 F.2d at 870.¹²

This principle has been most strictly applied in cases such as the one at bar where the petitioner had already received a fair and adequate hearing in a post-conviction relief proceeding. *Davis v. Justice Court*, 439 F.2d 701 (9th Cir. 1971); *McCoy v. Tucker*, 259 F.2d 714 (4th Cir. 1958); accord, *Dorsey v. Gill*, supra, 80 U.S. App. D.C. at 21-22, 26, 148 F.2d at 869-870, 874.

In the present case, the District Judge in considering appellant's petition had before him (or had access to) the

¹² The Court in *Dorsey* affirmed the denial of the habeas corpus petition without a hearing. More recently, in *Linehan v. Minnesota*, 437 F.2d 395 (1971), the Eighth Circuit similarly concluded that the trial court was not required to hold a hearing on a petition claiming ineffective assistance of counsel. Counsel had urged the petitioner to plead guilty after informing him that he had a right to challenge the admissibility of an allegedly coerced confession but that his chances of winning were non-existent. Accord, *Moore v. Wainwright*, 401 F.2d 525 (5th Cir. 1968) (petitioner claimed that his counsel had coerced him to plead guilty); *United States ex rel. Green v. Follette*, 421 F.2d 1392 (2d Cir. 1970) (petitioner argued that his identification at trial was tainted).

full record of the trial, a memorandum from the trial judge concerning the effectiveness of trial counsel and this Court's opinion in the 1963 appeal. Holding a full evidentiary hearing with appellant present would not have added anything to the disposition of the petition. This, therefore, appears to be the very type of case which the drafters of section 2243 intended to have disposed of without the issuance of either a show cause order or the holding of a hearing.¹³

CONCLUSION

WHEREFORE, is respectfully submitted that the judgment of the District Court should be affirmed.

HAROLD H. TITUS, JR.,
United States Attorney.

JOHN A. TERRY,
RAYMOND BANOUN,
Assistant United States Attorneys.

¹³ The cases cited by appellant are clearly inapplicable to the instant circumstances. In *Evans v. Rives*, 75 U.S. App. D.C. 242, 126 F.2d 633 (1942), the petitioner, who was charged with failure to provide support for his minor child, was permitted to plead guilty without the aid of counsel and without being told that he had a right to enter a not guilty plea and be tried by a jury. This Court reversed the denial of the habeas corpus petition, citing the Supreme Court's decision in *Johnson v. Zerbst*, 304 U.S. 458 (1937). In *United States v. Simpson*, 141 U.S. App. D.C. 8, 436 F.2d 162 (1970), this Court remanded the case for a hearing, because it found the petitioner's claim that he pleaded guilty after he had been assured by his attorney that the judge had agreed to give him a Youth Corrections Act sentence "too specific to be denied as merely conclusory." *Id.* at 11, 436 F.2d at 165. Finally, in *Smith v. United States*, *supra* note 11, the denial of a 28 U.S.C. § 2255 motion without a hearing was affirmed. The appellant's contention was that he had been held in custody for thirteen days before being arraigned and that a confession had been obtained from him as a result of that illegal confinement. This Court declared that Smith could have attacked the challenged evidence on a direct appeal from his conviction but had failed to do so. 88 U.S. App. D.C. at 86, 87 F.2d at 198.

APPENDIX

[Filed April 3, 1962]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal Case No. 730-61

UNITED STATES OF AMERICA, PLAINTIFF

v.

ROBERT GRAY, DEFENDANT

MEMORANDUM

The defendant, who was represented at the trial by counsel retained by him, filed an application *in propria persona* for leave to appeal *in forma pauperis* from a judgment of conviction of murder in the second degree. The evidence would have amply justified a conviction of murder in the first degree, as the defendant had fatally shot the deceased in cold blood after an interval of an hour or more following a petty quarrel arising out of a paltry episode. It was the impression of the Court at the trial that the leniency extended to the defendant by the jury was due very largely to the tactful and skillful manner in which his counsel handled the defense, and counsel's mastery of courtroom psychology derived in large part from long experience. Instead of being grate-

ful to his counsel for the able manner in which the defense was conducted, the application makes an unwarranted attack on counsel for alleged ineffective assistance.

Much of the affidavit in support of the application is irrelevant, as, for instance, he discusses psychiatry, although the defense of insanity was not even advanced. It could not have been because the defendant took the witness stand in his own behalf and testified at great length, perfectly rationally, both on direct and cross-examination, even though the jury by necessary implication found that some vital parts of his testimony were perjurious. The petition is a tissue of irrelevancy, and exaggerated and even untrue statements, which are so typical of many motions and petitions filed by defendants in criminal cases *in propria persona*. There is not a single, substantial ground advanced in support of an appeal, and in the opinion of this Court the appeal is frivolous. On the other hand, the principal expense of an appeal is the cost of the transcript. A transcript was furnished to the defense at Government expense at the time of the trial and, consequently, no further expense to the Government would be incurred by allowing the appeal, with the exception of filing fees and other expenses that are comparatively negligible. In view of this circumstance and in view of the fact that the defendant has received a long sentence of imprisonment, the appeal is allowed. Whether counsel should be appointed is a matter for the Court of Appeals.

/s/ ALEXANDER HOLTZOFF
United States District Judge

April 2, 1962.

